Lembaman Development Sdn Bhd v Ooi Lai Yin & Anor and other cases

HIGH COURT (PULAU PINANG) — JUDICIAL REVIEW NOS 25–57–05 OF 2014, 25–59–05 OF 2014 AND 25–67–05 OF 2014
COLLIN SEQUERAH JC
10 APRIL 2015

Administrative Law — Judicial review — Certiorari — Application for — Award of Homebuyers Tribunal — Allegation that Homebuyers Tribunal erred in calculation of damages for vacant possession — Both parcel and facilities within same building — Liquidated and ascertained damages — Whether available for delayed completion of common facilities — Whether Tribunal erred in holding decision

The applicant, a developer of a housing project, applied for an order of certiorari to quash the decision of the Tribunal of Homebuyers ('Tribunal'). The respondents, the Homebuyers Tribunal, purchased the property from the applicant. The grounds for this application were threefold. It was submitted that the Tribunal had erred in the commencement date used in computing the period of delay in handing over vacant possession for the purposes of calculating the liquidated and ascertained damages ('LAD'); the adoption of the purchase price as the base price for the award even though rebates were given; and holding the applicant responsible and liable for delay in completion of both parcels and the common facilities which led to the issue of double claim. The applicant submitted that the computation of 36 calendar months by virtue of cl 25(1) of the sales and purchase agreement ('SPA'), should be the date of the SPA and not the date of the first booking as adopted by the Tribunal. The applicants argued, in the alternative, that since the SPA was dated 15 December 2010, the computation of 36 months ought to be calculated from 16 December 2013 to 14 January 2014, ie 29 days delay instead of 316 days as computed by the Tribunal. For the second ground, the applicant argued that the figure used by the Tribunal was the sale price in the SPA which was RM389,900 whereas the actual purchase price was RM369,900. For the third ground, the applicant submitted that the parcel and the common facilities were within the very same building and that the purchase price paid under the agreement was for both the parcel and common facilities and not separately.

Held, dismissing the applicant's applications with costs:

(1) The relevant date was the date when the booking fee was paid. If the position was otherwise, developers could arbitrarily fix any date to have the SPA executed to the prejudice of the purchasers. Therefore, once the

booking fee was paid, a contract comes into existence and parties assume obligations at that juncture, a breach of which would result in certain consequences befalling the guilty party. The Tribunal therefore had not erred when it decided to ascertain the date for calculation of damages for vacant possession with reference to the booking date (see para 10).

(2) The SPA clearly stated that 10% of the purchase price was RM38,990. Deducting the booking fee of RM3,000 paid by the respondent's gave a balance of RM35,990. When the applicant collected the sum of RM15,990 from the respondent's the amount of the rebate ie, RM20,000 for payment of the balance purchase price was deemed as collected. Therefore, the rebate only affected the balance 10% of the purchase price and had no impact on the purchase price itself which remained at RM389,900. Further, the monthly instalments required to be paid by the respondent's would not deviate from the figure stated as the purchase price in the SPA. Therefore the decision of the Tribunal in using the sum of RM389,900 as the base figure to compute the award was not erroneous (see para 14).

(3) Clauses 25 and 27 of the SPA indicated that the parcel and the common facilities relate to entirely different things and the prescribed penalties for non-compliance were different. Being a statutory form of contract, it was reasonable to also conclude that the intention of the Legislature was to treat the two clauses as distinct. An examination of the Certificate of Completion and Compliance ('CCC') also revealed that the description of the parcel and the common facilities were treated as distinct from each other. There was no case of overlapping between the liquidated damages prescribed for late delivery of the 'parcel' and that of the 'common facilities' (see para 19).

(4) The Tribunal's award was not flawed and there was no error of law in the award made. The provision of damages for the delay in the completion of the 'common facilities' was something known to the parties when the contract was made and therefore the ensuing damages were not too remote. The damages thus awarded for the delay in the completion of the 'common facilities' were in accordance with the provision of ss 74 and 75 of the CA (see para 26).

[Bahasa Malaysia summary

Pemohon, pemaju projek perumahan, memohon perintah certiorari bagi membatalkan keputusan Tribunal Pembeli Rumah ('Tribunal'). Responden-responden, Tribunal Pembeli Rumah, telah membeli hartanah daripada pemohon. Alasan bagi permohonan ini adalah tiga kali ganda. Dikemukakan bahawa Tribunal terkhilaf dalam tarikh permulaan digunakan dalam mengira tempoh kelewatan dalam penyerahan milikan kosong bagi maksud mengira ganti rugi jumlah tertentu dan ditentukan ('LAD');

penggunaan harga beli sebagai harga asas untuk award walaupun rebat diberikan; dan memutuskan pemohon bertanggungjawab dan bertanggungan bagi kelewatan penyiapan kedua-dua parcel dan kemudahan bersama yang membawa kepada isu tuntutan berganda. Pemohon menghujahkan bahawa pengiraan 36 bulan kalendar menurut klausa 25(1) perjanjian jual beli ('PJB'), sepatutnya tarikh PJB dan bukannya tarikh tempahan seperti yang diguna pakai oleh Tribunal. Pemohon menghujahkan, secara alternatif, bahawa kerana SPA bertarikh 15 Disember 2010, pengiraan 36 bulan patut dikira dari 16 Disember 2013 hingga 14 Januari 2014, iaitu lewat 29 hari, bukannya 316 hari seperti yang dikira oleh Tribunal. Bagi asas kedua, pemohon menghujahkan bahawa angka yang digunakan oleh Tribunal adalah harga jualan dalam PJB iaitu RM389,900 manakala harga belian sebenar adalah RM369,900. Bagi asas ketiga, pemohon mengemukakan bahawa parcel dan kemudahan awam dalam bangunan yang sama dan harga belian yang dibayar di bawah perjanjian itu adalah untuk kedua-dua parcel dan kemudahan bersama dan bukan secara berasingan.

Diputuskan, menolak permohonan pemohon dengan kos:

(1) Tarikh yang relevan adalah tarikh yuran tempahan dibayar. Jika kedudukan adalah sebaliknya, pemaju boleh sewenang-wenangnya menetapkan sebarang tarikh agar PJB dilaksanakan, memudaratkan pembeli. Oleh itu, apabila yuran tempahan dibayar, kontrak wujud dan pihak menganggap kewajipan berbangkit pada waktu itu dan pelanggarannya akan menyebabkan akibat tertentu menimpa pihak bersalah. Tribunal tidak terkhilaf apabila memutuskan untuk menentukan tarikh pengiraan ganti rugi bagi milikan kosong dengan merujuk kepada tarikh tempahan (lihat perenggan 10).

(2) SPA dengan jelas menyatakan bahawa 10% daripada harga pembelian adalah RM38,990. Menolak yuran tempahan sebanyak RM3,000 yang dibayar oleh responden menjadikan baki RM35,990. Apabila pemohon mengumpul jumlah RM15,990 daripada jumlah rebat responden, RM20,000 sebagai bayaran baki harga belian disifatkan sebagai terkumpul. Oleh itu, rebat hanya memberi kesan kepada kira-kira 10% daripada harga belian dan tidak memberi kesan kepada harga belian itu sendiri yang kekal pada RM389,900. Selanjutnya, ansuran bulanan yang perlu dibayar oleh responden tidak tersimpang daripada angka yang dinyatakan sebagai harga belian dalam PJB. Oleh itu, keputusan Tribunal dalam menggunakan jumlah RM389,900 sebagai angka asas untuk mengira award tidak salah (lihat perenggan 14).

(3) Fasal 25 dan 27 PJB menunjukkan bahawa parcel dan kemudahan awam berkaitan perkara yang sama sekali berbeza dan penalti yang ditetapkan bagi ketidakpatuhan juga berbeza. Sebagai satu bentuk kontrak berkanun, adalah munasabah untuk membuat kesimpulan bahawa niat

badan perundangan adalah untuk menganggap dua klausa ini sebagai berbeza. Pemeriksaan Sijil Perakuan Siap dan Pematuhan ('SPSP') juga mendedahkan bahawa perihal parcel dan kemudahan bersama dianggap sebagai berbeza daripada satu sama lain. Tidak ada kes bertindih antara ganti rugi tertentu yang ditetapkan bagi penghantaran lewat parcel dan kemudahan bersama (lihat perenggan 19).

(4) Award Tribunal tidak cacat dan tidak ada kesilapan undang-undang dalam award yang dibuat. Peruntukan ganti rugi bagi kelewatan dalam penyiapan kemudahan bersama adalah sesuatu yang diketahui oleh pihak-pihak apabila kontrak dibuat dan oleh itu, ganti rugi berikutnya tidak terlalu asing. Dengan itu, ganti rugi diawardkan untuk kelewatan penyiapan kemudahan bersama adalah selaras dengan peruntukan ss 74 dan 75 Akta Syarikat (lihat perenggan 26).]

Notes

For cases on certiorari, see 1(1) *Mallal's Digest* (5th Ed, 2015) paras 384–405.

Cases referred to

Hadley and another v Baxendale and others (1854) 9 Exch 341; [1843-60] All ER Rep 461 (refd)

Lim Eh Fah & Ors v Seri Maju Padu [2002] MLJU 300; [2002] 4 CLJ 37, HC (refd)

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy [1995] 1 MLJ 817, FC (refd)

Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors [2008] 4 MLJ 852, CA (refd)

Legislation referred to

Contracts Act 1950 ss 74, 75
Housing Development (Control And Licensing) Act 1966 Schedule H
Housing Development (Control And Licensing) Regulations 1989
Strata Titles Act 1985

Quah Boon Nee (JB Lim & Assoc) for the applicant.
Lai Mei Fong (Murad & Foo) for the respondents.

Collin Sequerah JC:

THE APPLICATIONS

[1] This case upon the agreement of parties was heard together with case No 25–59–05 of 2014 and case No 25–67–06 of 2014 as most of the issues involved are common. They are all applications by way of judicial review by a common applicant for certiorari to quash the decision of the tribunal of

Homebuyers ('Tribunal'), given on 22 April 2014 in respect of case No 25–59–05 of 2014 and 7 May 2014 in respect of case No 25–57–05 of 2014 and case No 25–67–06 of 2014 respectively. The applicant in all three applications is the developer of a housing project while the first and second respondent's in case No 25–59–05 of 2014 and 25–67–06 of 2014 and the first respondent in 25–57–05 of 2014 respectively are purchasers of properties from the applicant. The second respondent in case No 25–57–05 of 2014 and the third respondent in cases No 25–59–05 of 2014 and 25–67–06 of 2014 is the tribunal.

[2] In respect of all of the cases the type of sale and purchase agreement used was the statutory contract pursuant to Schedule H of the Housing Development (Control And Licensing) Act 1966 and Housing Development (Control And Licensing) Regulations 1989 and sub-reg 11(1).

CHRONOLOGY OF EVENTS

[3] In order to facilitate an understanding of these applications and the issues involved, it is pertinent to list a chronology of events as follows:

(for case No 25–57–05 of 2014)

Dates	*Events*
16 May 2010	housebuyers paid RM3,000 and deposit for car park
12 June 2010	housebuyers paid a further RM15,590
5 October 2010	developer issued credit note for RM20,000
3 January 2011	sales and purchase agreement ('SPA') dated by purchasers solicitors
31 December 2013	completion notice issued by developer to housebuyer
14 January 2014	deemed delivery of vacant possession
7 May 2014	Award made by Tribunal ('third respondent'): RM22,942.55 for late delivery and RM6,452.04 for late completion of common facilities. (total: RM27,235.03)

(for case No 25–59–06 of 2014)

Dates	*Events*
17 February 2010	house buyers paid RM3,000 and deposit for car park
5 March 2010	house buyers paid RM15,990
5 October 2010	developer issued credit note for rebates of RM20,000

15 December 2010	SPA dated by purchasers solicitors
31 December 2013	completion notice issued by developer to house buyers.
14 January 2014	Deemed delivery of vacant possession.
22 April 2014	Award made by Tribunal ('third respondent'): RM33,755.73 for late delivery and RM6,452.04 for late completion of common facilities. (total: RM40,207.77)

(for case No 25–67–06 of 2014)

Dates	*Events*
3 January 2010	house buyers paid RM3,000 and deposit for car park
10 March 2010	house buyers paid the balance deposit of RM20,790
3 January 2011	SPA dated by purchasers solicitors
31 December 2013	completion notice issued by developer to house buyers
9 March 2013	Deemed delivery of vacant possession.
7 May 2014	Award made by Tribunal (3rd Respondent): RM20,270.38 for late delivery and RM3,871.58 for late completion of common facilities. (total: RM24,141.96)

GROUNDS OF APPLICATION

[4] The grounds for these applications are essentially threefold and as follows:

(a) the tribunal erred in the commencement date used in computing the period of delay in handing over vacant possession;

(b) the tribunal erred in the adoption of the purchase price as the base price for the Award even though rebates were given; and

(c) the tribunal erred in holding the applicant responsible and liable for delay in completion of both the parcel and the common facilities.

[5] Each of these will be considered in turn. The references to the chronology of events, time frames and documents including enclosure numbers referred to in the course of this judgment all relate to case No 25–59–06 of 2014 only. The findings of this court, however, are the same and binds all the cases, save for issue (b) in respect of the rebates which does not apply to case No 25–67–06 of 2014.

(a) The tribunal erred in the commencement date used in computing the period of delay in handing over vacant possession

[6] In respect of issue (a), cl 25(1) of the sales and purchase agreement ('SPA') states that vacant possession of the parcel shall be delivered to the purchaser within 36 calendar months from the date of the SPA. It is the applicant's contention that the proper date of commencement of calculation of the delay in handing over vacant possession should be the date of the SPA and not the date of the first booking adopted by the tribunal ie 17 February 2010. The reason for their contention is that there cannot be a concluded contract on that date (first booking date) because the amount paid only amounts to 1% of the purchase price and should there be a failure to pay the balance 10% and to sign the SPA within 14 days, there would be no sale concluded. They contend therefore that a contract only comes into existence upon payment of 10% of the purchase price, which in this particular case was contended to be on 5 October 2010 where the applicant granted rebates and issued the credit note upon which the 10% was deemed settled. Alternatively, since the SPA is dated 15 December 2010, the promised date for delivery of vacant possession is 36 months thereafter, that is on 15 December 2013, henceforth, the delay in delivery of vacant possession ought to be calculated from 16 December 2013 to 14 January 2014, ie 29 days delay instead of 316 days as computed by the tribunal.

[7] The respondent's contention on the other hand is that all established legal authorities state that the date for purposes of calculation of damages for late delivery of vacant possession is not from the date of the settlement of the 10% deposit or SPA but from the date of payment of first deposit. In further support of their contention, they referred to a receipt dated 17 February 2010 for the sum of RM3000 issued in respect of payment of partial 10% of Item 1, exhibited at p 85 of encl 8 in case No 25–59–05 of 2014. Item 1 is the purchase price as stated in the Third Schedule of the SPA. Reference was also made to a document exhibited at p 46 of encl 2 in Case No 25–59–05 of 2014 which is a receipt issued by the applicant containing, inter alia, under the remarks column a rebate of the sum of RM20,000 and containing a sales date of 17 February 2010. A letter of offer contained in the same exhibit at p 47 until p 49 revealed the date as being 17 February 2010 which is the same date as that of the payment of the booking fee ie 17 February 2010. In fact p 47, which is the applicant's own document, contains the wordings 'I/We have agreed to purchase the above captioned property from the above named Vendor ...'. These documents, submit the respondent, evince a clear intention on the part of the applicant to be bound contractually to the respondent's with reference to the date when the booking fee ie 17 February 2010, was paid.

Finding of the court in respect of issue (a)

[8] The clear issue that lends itself for determination here is which date is to be taken as the date for computation of delay in delivery of vacant possession for the purposes of calculating the liquidated and ascertained damages ('LAD'). The authority relied upon by the tribunal in coming to its decision was the case of *Lim Eh Fah & Ors v Seri Maju Padu* [2002] MLJU 300; [2002] 4 CLJ 37 where on the facts a sum equivalent to 10% deposit was paid upon booking. The short issue was whether to adopt the booking dates or the sale agreement date of deed of assignment as contended by the developer. The court held that the booking date was to be adopted as that was the date when the contract was struck. In so holding the court reasoned as follows:

> One must bear in mind that the date of 17 July 1992 ie, the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the S&P agreement were to be taken as the relevant date, when time started to run for the delivery of the vacant possession, *the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which would certainly prejudice the interest of the purchaser*. (Emphasis added.)

[9] The court also said as follows:

> To support my findings, I seek solace from the case of *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 2 MLJ 597; [1995] 3 CLJ 797, which factually was on all fours with the current case. There a purchaser had bought a unit of property from the developer ('the appellant'). A deposit was paid on 17 February 1984 with the agreement being signed on 27 June 1984. The developer failed to deliver the impugned property within the agreed thirty-six months, whereupon the buyer claimed liquidated damages. Following an earlier case of *Hoo See Sen & Anor v Public Bank Bhd* [1988] 2 MLJ 170, the Supreme Court had decided that the relevant date for ascertaining when time started to run to be when the booking fee was paid. Under held it is clearly authored:
>
> > For the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time started to run was the date on which the purchaser paid the booking fee, and not the date of signing of the sale and purchase agreement.

[10] The finding of this court therefore that based on the aforesaid authority, the relevant date is the date when the booking fee was paid. The *Lim Eh Fah's* case clearly stipulated that were the position otherwise, developers could arbitrarily fix any date to have the SPA executed to the prejudice of the purchasers. If this were to be the case, then developers would obviously choose a date later in time with the intention of potentially having to bear less damages for late delivery of vacant possession. Therefore, once the booking fee is paid, a contract comes into existence and parties assume obligations at that juncture, a breach of which would result in certain consequences befalling the guilty

party. The tribunal therefore had not erred when it decided on good authority and in the absence of any authorities to the contrary, to ascertain the date for calculation of damages for vacant possession with reference to the booking date.

(b) The tribunal erred in the adoption of the purchase price as the base price for the award even though rebates were given

[11] In respect of issue (b), the contention of the applicant is that the base figure used by the tribunal to compute the Award is erroneous as it did not take into account the rebate of RM20,000 given by the applicant. The figure used by the tribunal was the sale price in the SPA ie RM389,900 whereas the actual purchase price is RM369,900. The use of the figure of RM389,900 as reflected in the SPA is thus unfair to the applicant. In case No 25–67–06 of 2014 the rebate is not an issue as no rebate was given there. Therefore the issue under discussion here only concerns cases No 25–57–05 of 2014 and 25–59–05 of 2014.

[12] The respondent's in reply submitted that the rebate affects only payment of the deposit which was deemed collected and not the monthly installments to be paid by the respondent's and therefore there is in fact no element of discount. Hence, the tribunal adopted the correct figure ie the sum of RM389,900 as reflected in the SPA in the computation of the Award.

[13] In support of their submission, the respondent's directed the attention of the court to p 86 of encl 8 in case 25–59–05 of 2014 which is the official receipt No 10207/DEP dated 5 March 2010 for the payment of 'BALANCE 10% of ITEM 1'. The court was then cross-referred to p 49 of the same enclosure which is ITEM 1 of the Third Schedule of the SPA which indicates the Schedule of Payment of Purchase Price and records the sum of RM38,990 as being the sum immediately payable upon the signing of the SPA ie 10% of the purchase price. The rebate is not captured in these documents. The rebate of RM20,000 was therefore deemed collected upon the applicant issuing their Official Receipt No 10207/DEP for payment of the balance 10% of the purchase price.

Finding of the court in respect of issue (b)

[14] The Third Schedule of the SPA clearly states that 10% of Item 1 which is the purchase price is RM38,990. Accordingly, the purchase price would then be RM389,990 which is reflected in s 5 of the Sixth Schedule of the SPA. Deducting the booking fee of RM3,000 paid by the respondent's on 17 February 2010 gives a balance of RM35,990 ie RM38,990 minus RM3,000 equals to RM35,990. So when the applicant collected the sum of RM15,990

from the respondent's and issued the Official Receipt No 10207/DEP dated 5 March 2010, the amount of the rebate ie RM20,000 for payment of the balance purchase price was deemed as collected ie RM35,990 minus RM20,000 equals to RM15,990. This fact was also admitted by the applicant's witness during the hearing before the tribunal at p 23 of encl 11. Therefore the rebate only affected the balance 10% of the purchase price and had no impact on the purchase price itself which remained at RM389,900. Further, the monthly installments required to be paid by the respondent's would not deviate from the figure stated as the purchase price in the SPA. The finding of this court therefore is that the decision of the tribunal in using the sum of RM389,900 as the base figure to compute the Award was not erroneous.

(c) The tribunal erred in holding the applicant responsible and liable for delay in completion of both the parcel and the common facilities

[15] Issue (c) concerned the issue of a double claim for the same default allegedly imposed upon the applicant by the decision of the tribunal. While cl 25(2) of the SPA imposes charges for delay in delivery of the parcel, cl 27(2) stipulates that the developer shall pay 2% (10% 0f 20%) of the purchase price for the late completion of the common facilities.

[16] The applicant's contention is that the parcel and the common facilities are within the very same building and the purchase price paid under the agreement is for both the parcel and common facilities and not separately. Therefore if the completion of the parcel was delayed, naturally the completion of common facilities will also be delayed as both are part of the same building and cannot be completely separated. To enable the purchasers to claim both compensation for the same delay could not be the effect of the agreement for otherwise Parliament would have imposed a 12%pa penalty (in the statutory contract) for delay in delivery of parcel alone (for there will never be a case where the common facilities are completed earlier than the parcel.) They further submit that the compensation for delayed completion of common facilities in cl 27(2) should only apply to a situation where the parcel is completed earlier than the common facilities (ie swimming pool and other infrastructures on different part of the building) for then the purchaser would be denied the benefits of the common facilities. It was also submitted that the purchase price for the parcel includes that of the common facilities and the schedule of payment refers to completion of both before the payment of completion price. There were no separate payment schedule for stages of completion for common facilities. Therefore a delay in completion of the building inevitably involves both parcel and common facilities within it.

[17] They submit that the LAD under cl 27(2) of SPA for delayed completion of common facilities is not available when the developer is already

late for the building where both the parcel and facilities are within it as otherwise the legislature would simply prescribe a penalty of 12% instead of 10% as prescribed under cl 25(2) and 2% under cl 27(2). Therefore the compensation under cl 27(2) is only available in a situation when after the delivery of parcel, the developer still failed to deliver the common facilities (ie pool, guard house etc). The logic of this, they submit, is that the purchaser would have failed to enjoy the promised facilities and therefore suffered losses. They say that no house buyers will be or are capable of having suffered any loss at all for the delay in completion of common facilities if the house buyers are in no position to move in and use the parcel with the common facilities any way. The house buyer cannot claim for loss of enjoyment of the facilities if he has not moved in or has not put up the parcel for rental. To award the respondent's with damages of 2% is certainly not a genuine pre estimation of damages and contradicts s 75 of the Contracts Act 1950 and the principle in the Federal Court case of *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817. A logical reading of the two penalty clauses ought to be read as to allow cl 27(2) only when the common facilities was completed later than the delivery of the parcel.

[18] The respondent's on the other hand submitted that the two types or head of damages are different things altogether. They directed the attention of the court to the terms of the SPA at pp 39 and 40 respectively which refer to cll 25 and 27. Clause 25 refers to the time for delivery of vacant possession of the parcel and stipulates payment of liquidated damages at the rate of 10% per annum on a daily basis of the purchase price whereas cl 27 stipulates liquidated damages at the rate of 10%pa calculated on a daily basis of the last 20% of the purchase price for completion of the common facilities. The method and nature of the computation is different because they refer to different things. To fortify their argument, the respondent's directed reference to the interpretation section in cl 35(g) of the SPA at p 42 of encl 8 where 'parcel' means parcel as defined under the Strata Titles Act 1985 which in turn defines parcel as 'in relation to a subdivided building, means one of the individual units comprised therein, which (except in the case of an accessory parcel) is held under separate strata title, and in relation to a subdivided land, means one of the individual units of land parcel'. A reference to the Second Schedule to the SPA lists and describes Common Facilities and Services' as encompassing swimming pool and children's pool, gymnasium, landscaped gardens, BBQ pit and multi-purpose hall. This, argue the respondent's, show that the description of common facilities has got nothing to do with the parcel and therefore there is no overlapping between the two. They are thus two very different and separate type of damages. They also referred to the Court of Appeal decision of *Sentul Raya Sdn Bhd v Hariram a/l Jayaram & Ors* [2008] 4 MLJ 852 where it was held, inter alia, that the respondents in the case were not under a duty to prove the damages that they have suffered because cl 22(2) of the statutory contract provides that the damages are liquidated and calculated in accordance with the

formula prescribed by the clause and that no further onus lay upon the respondents. Similarly, since there is a prescribed formula here, the respondents are entitled to the liquidated damages according to the formula prescribed without having to prove their losses for both heads of damages as they have been separately categorised.

Finding of the court in respect of issue (c)

[19] A perusal of cll 25 and 27 of the SPA indicates that that they relate to entirely different things. If it were otherwise, they would be no necessity to include them in two different clauses. Indeed, if one were to examine the wordings of these clauses, one would find that they describe two very different things and the prescribed penalties for non-compliance are different. Further, a comparison between the interpretation section in cl 35(g) of the SPA and Second Schedule to the SPA show that 'parcel' and 'common facilities and services' respectively are described differently. Being a statutory form of contract, it is reasonable to also conclude that the intention of the Legislature was to treat the two clauses as distinct. An examination of the Certificate of Completion and Compliance ('CCC') at p 89 of encl 8 also reveals very clearly that the description of the parcel and the common facilities are treated as distinct from each other. Therefore the decision of this court is that there is no case of overlapping between the liquidated damages prescribed for late delivery of the 'parcel' and that of the 'common facilities'.

[20] With respect to the contention that the respondent's have suffered no loss in respect of the late delivery of the 'common facilities' because the 'parcel' had yet to be delivered, the short answer can be found in the *Sentul Raya* case itself where it was held that contracts such as the one under consideration are categorised as special contracts as it is prescribed and regulated by statute. So while parties in normal contractual cases have the freedom to make provisions between themselves, such freedom is not accorded to a housing developer and so parties to a contract under Schedule H cannot contract out of the prescribed Schedule. To make the position clear the relevant passage from the case of Sentul Raya is reproduced as follows:

> The contract which has fallen for construction in the present cases is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence, parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract.

[21] Therefore, where the statutory form of contract prescribes for the provision of liquidated damages both in respect of the delay in the delivery of

the 'parcel' and the 'common facilities', the developer is not at liberty to contend that the damages for the delay in the delivery of the 'common facilities' is contingent upon the delivery of the 'parcel'. With regard to the applicant's contention that awarding of damages for the late delivery of the 'common facilities' in addition to the 'parcel' would contradict s 75 of the Contracts Act 1950 and the principle in *Selva Kumar a/l Murugiah*'s case, an examination of that decision by the Federal Court will reveal that it was held that a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles in *Hadley and another v Baxendale and others* (1854) 9 Exch 341; [1843-60] All ER Rep 461.

[22] Now, the principles enunciated in the case of *Hadley v Baxendale* are these:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. (Emphasis added.)

[23] The second limb of *Hadley v Baxendale*, in the considered opinion of this court, provides sufficient basis for the recovery of the liquidated damages for delay in the delivery of the 'common facilities' in the prescribed statutory contract.

[24] Such damages resulting as a result of any such breach would certainly have been within the contemplation and knowledge of both the applicant and the respondents at the time the contract was made and this is even more so where in a case such as this, the statutory form of contract was used by parties.

[25] This conclusion further leads to another relevant point and that is such damages were in all the circumstances of the case, not too remote. Indeed the common law principle in *Hadley v Baxendale* is embodied in s 74 of the Contracts Act 1950 which reads as follows:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, *or which the parties knew, when they made the contract, to be likely to result from the breach of it*. (Emphasis added.)

[26] The provision of damages for the delay in the completion of the 'common facilities' was something known to the parties when the contract was

made and therefore the ensuing damages were not too remote. The damages thus awarded for the delay in the completion of the 'common facilities' were in accordance with the provision of ss 74 and 75 of the Contracts Act 1950.

[27] In the premises, there is no contradiction with the operation of s 75 of the Contracts Act 1950 (this being a special form of statutory contract) and the principles espoused in the case of *Selva Kumar a/l Murugiah*'s case. In any event, this court is of the view that the damages stipulated for delay in the delivery of the 'common facilities' are reasonable within the contemplation of s 75 of the Contracts Act 1950. The finding of this court is therefore that the tribunal's Award was not flawed and there is no error of law in the Award made. In the upshot, the applications of the applicant are hereby dismissed with costs.

Applicant's applications dismissed with costs.

Reported by Afiq Mohamad Noor